No. 158

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

SILVER KING COALITION MINES COMPANY,
A CORPORATION,
Petitioner,
vs.
CONKLING MINING COMPANY,
A CORPORATION,
Respondent.

BRIEF ON BEHALF OF RESPONDENT.

WILLIAM D. McHUGH,
Of Counsel.

SUBJECT-INDEX

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STATEMENT OF THE CASE

This is an action in equity begun in the District Court of the United States for the District of Utah, in January, 1908, by which the Conkling Mining Company, respondent, seeks to quiet its title to an undivided three-quarters (¾) of the Conkling Mining Claim, and to recover of the Silver King Coalition Mines Company, petitioner, three-quarters (¾) of the value of the ore which said Petitioner removed from beneath the surface of the Conkling Mining Claim.

There is no dispute that the respondent is the owner of an undivided three-quarters (¾) of the Conkling Mining

Claim under a patent issued to its predecessor in interest on February 23, 1892. The patent was issued in the usual way, and conveyed the claim.

> "Bounded, described and platted as follows, with magnetic variation seventeen degrees and twenty minutes east: "Beginning at corner No. 1 a pine post four inches square marked 'U. S. 689 P. 1,' thence first course, north twenty-one degrees and nine minutes west three hundred feet to discovery point, six hundred feet to corner No. 2, a pine post four inches square marked 'U. S. 689 P. 2,' being also corner No. 4 of lot No. 191, the Lincoln lode claim, and corner No. 2 of lot No. 580, the Pirate King lode claim, from which U. S. mineral monument No. 4 bears north thirty-two degrees and fifty-two minutes west nine hundred and thirty-nine and three-tenths feet distant, and a pine tree four inches in diameter marked U. S. 689 P. 2 B. T.' bears north thirteen degrees west twenty-eight feet distant; thence second course, south sixty degrees and forty-five minutes west one thousand five hundred feet to corner No. 3; thence third course, south twenty-one degrees and nine minutes east six hundred feet to corner No. 4; thence, fourth course, north sixty degrees and forty-five minutes east one thousand five hundred feet to corner No. 1, the place of beginning—said lot No. 689 extending one thousand five hundred feet in length along said Conkling vein or lode, and containing twenty acres and forty-five hundredths of an acre of land more or less."

The petitioner interposed two defenses:

First, that the ore was taken from the westerly 135.5 feet of the claim described in the patent and that this part of the claim was not conveyed by the patent, because the post set by the Government surveyor to mark the westerly corners of the claim were only 1,364.5 feet distant respectively from the easterly line of the claim;

Second, that the ore taken from beneath the surface of the Conkling claim was a part of the Crescent fissure vein which had its apex in defendant's Constitution, Cumberland and Monroe Doctrine claims, crossed the side lines of those claims in its course, and, on its dip, extended through the vertical planes passing through their end lines and beneath the surface of the Conkling claim to the Elephant stope; that the end lines of defendant's claims became their side lines, and that, therefore, the defendant was the owner of the ore taken from the Elephant stope.

The petitioner further contended that the cost of extracting the ores was in excess of the value of the same, and that, therefore, there was no liability to account.

By stipulation of counsel, to which the Court assented, it was agreed that the disputed question as to the ownership of the land and the disputed question as to the ownership of the vein situated therein were first to be tried, and that a decree should be entered upon these issues, and that if these issues should be resolved in favor of the plaintiff (respondent) an accounting would then be ordered (Supplemental Transcript, pp. 66 and 67).

Trial was then had upon the issues stated. Many witnesses were produced and much documentary evidence submitted; on July 15, 1912, the trial court decided the case in favor of the defendant (petitioner) both as to the title of the land and the title of the ore, and dismissed the suit.

From this decree an appeal was taken to the Circuit Court of Appeals; and on February 12, 1916, the decree of the trial court was reversed; the Court of Appeals finding in favor of the plaintiff (respondent), both as to the title to the land and the title to the ore. The case was ordered remanded for further proceedings consistent with the opinion.

The Silver King Company applied for a rehearing in the Circuit Court of Appeals, which was denied. It

thereupon presented to this court a petition for a writ of *certiorari*. The petition was accompanied by a transcript of the record, and an elaborate brief was filed in support of the same. This petition was, by this court, denied on October 16, 1916 (242, U. S. 629).

Thereupon a mandate from the Circuit Court of Appeals was returned to the District Court. In that court a decree was entered on January 20, 1917 (Transcript of Record, p. 95), adjudicating the rights of the parties in accordance with the opinion of the Circuit Court of Appeals, and ordering the Silver King Company to account to the Conkling Company for three-quarters (¾) of all ores mined within the common property, and directing that an accounting be had.

Thereafter the case came on to be heard upon the accounting, and the District Court entered a decree finding that the Conkling Company was entitled to recover from the Silver King Company, Five Hundred and Forty-two Thousand, Two Hundred and Twenty-two Dollars and Fifty-eight Cents ($542,222.58), as of March 1, 1918 (Transcript of Record, p. 53).

An appeal was thereupon taken by the Silver King Company from said decree to the Circuit Court of Appeals, and a cross appeal was perfected from the said decree by the Conkling Company. These appeals were heard, and on December 19, 1918, the Circuit Court of Appeals entered a decree modifying the decree of the District Court by increasing the sum to be recovered by the Conkling Company to $570,076.50. (Transcript of Record, pp. 505-6.)

Thereupon the Silver King Company petitioned the Circuit Court of Appeals for a rehearing, which was denied. Thereafter it presented to this court a petition for writ of *certiorari*, accompanied by a brief in support

thereof. By leave of court, a brief in support of the petition was filed by William C. Prentiss, as *amicus curiae*.

The Solicitor General of the United States filed suggestions relative to the granting of the writ, and joined in the request that the writ issue. Thereupon, this court granted the writ of *certiorari*, and the case is now submitted upon the record and briefs.

Attention of the court should be called to the fact that the transcript of record is in two volumes; one entitled "Transcript of Record," and the other, "Supplemental Transcript of Record." The volume entitled "Transcript of Record" contains the record before the Circuit Court of Appeals, in the matter involving the accounting. The volume entitled "Supplemental Transcript of Record" is the record before the Circuit Court of Appeals upon the question involving the title to the land and the title to the ore.

The Silver King Company not only applied to this court for a writ of *certiorari* but it also prefected an appeal to this court from the decree of the Circuit Court of Appeals. That appeal is entered upon the docket of this court as Case No. 187; a motion has been filed by the Conkling Company to dismiss the appeal for want of jurisdiction. By stipulation of the parties the record upon the appeal as well as the record upon the writ of *certiorari*, are submitted together, and are both before the court.

ARGUMENT

THE RULINGS OF THE CIRCUIT COURT OF APPEALS COMPLAINED OF IN THIS CASE ARE ALL BASED UPON FINDINGS OF FACT UPON DISPUTED TESTIMONY, FOUND AGAINST THE PETITIONER IRRESPECTIVE OF THE RULINGS OF SAID COURT UPON POINTS OF LAW.

There were three disputed questions decided by the Court of Appeals, namely:

First, that the boundaries of the Conkling lode claim include the strip in dispute.

Second, that the defendant had no legal right to follow the Crescent Fissure vein and extract ores therefrom beyond the end lines of their claims extended vertically downward.

Third, the amount due the complainant upon the accounting.

First. In the matter of the boundaries, the case presents two issues: one of law, and one of fact. The dispute of law was as to whether, in view of the fact that there was no ambiguity in the description of the claim as set forth in the patent, it was competent for the defendant to introduce field notes of the survey of the claim, which field notes referred to certain bearing trees and posts at the northwest and southwest corners of the claim (which were not referred to in the patent itself), and thereby to create an ambiguity and then to introduce testimony as to the location of these bearing trees and posts and then establish a western boundary different from that called for by the patent itself. On this question, the plaintiff contended that the evidence referred to was inadmissible, while the defendant contended that it should be considered. This question was resolved against the defendant by the Court of Appeals,

which held that the patent itself, being free from any ambiguity, its courses and distances must control.

We think that the decision of the Circuit Court of Appeals was entirely right, and our argument upon this question will be found on pp. 15-45 of our main brief on this hearing.

But the decision of the Court of Appeals as to the true location of the western boundary of the Conkling lode claim was not based solely upon the issue of law above referred to. All the evidence which the defendant offered, namely, the field notes and the testimony respecting the bearing trees and posts, was received in evidence over our objection, and was in the record before the Court of Appeals. The plaintiff contended, however, that this testimony was so vague and uncertain that even if it was to be considered, it was insufficient to establish a boundary different from that described in the patent. This was the issue of fact. The Court of Appeals, notwithstanding its holding that this evidence was not competent to modify the clear and unequivocal description contained in the patent, proceeded to examine the evidence in the record upon this question, and decided that, even if the law made this evidence competent and it was therefore to be considered, it was insufficient to establish a western boundary of the claim different from that described in the patent.

The language of the Court of Appeals on this point is as follows, 230 Fed. 557-560 (Supplemental Transcript of Record, p. 250):

> "This testimony, and all the other evidence upon this subject, has been carefully read more than once, and deliberately considered in view of the established rule that the finding of the Chancellor should not be disturbed unless he has made a serious mistake of fact or has fallen into some plain error of law * * *

"The Court is of the opinion that if all the evidence offered had been competent it would have been insufficient to overcome the strong presumption that the plain description in the patent was right, insufficient to overcome the facts that the plat showed the claim to be 1,500 feet in length and 600 feet in width, that the surveyor general certified that the plat was correct, that the field notes recited that the claim was 1,500 feet in length and 600 feet in width, that the field notes, the plat and the patent each declare that the area claimed was 20.45 acres, that this is the area of a tract 1,500 feet in length and 600 feet in width, while the area of a tract 1,364.5 feet in length and 600 feet in width is nearly 2 acres less, and the persuasive presumption that the plain description in the patent expressed the actual intention of the parties to it. * * * And finally the proof that the westerly posts of the official survey upon which this patent was granted were originally set only 1,364.5 feet distant from the easterly line of the claim is not of that certain and satisfactory character which would warrant a court in avoiding, so many years after the issue of the patent, the grant which the United States clearly made."

It is clear, therefore, that even if the question of law relied upon by the defendant with respect to boundaries should be resolved in its favor, there would still be presented the question of fact as to whether, under that rule of law, the evidence in the record was sufficient to overcome the clear description of the patent. This is a question of fact which was resolved, as was said, against the defendant by the Court of Appeals.

Our discussion of the evidence on this point will be found in our main brief, pp. 85-107.

The validity of the Conkling patent is not questioned in this suit. The Government has never instituted proceedings to attack it for fraud. No one, in this suit or

otherwise, has instituted proceedings to have the patentee or his successors adjudged to hold the title to the claim in trust for anyone. The sole question in issue, as to the patent, is as to the boundaries of the claim thereby conveyed.

Second. In respect to the second point relied on, the right to follow the Crescent fissure extralaterally, the Circuit Court of Appeals weighed carefully the evidence relied upon by the petitioner to establish its claim. (Supplemental Transcript, Record, pp. 254-257.) Summing it all up the Court says that it "convinces that the Crescent fissure was not his discovery vein and that it was only a cross vein in claims whose discovery veins run lengthwise of the claims," and further, that all of the enumerated facts "converge with compelling power to force our minds to the conclusion that there is no preponderance of evidence in this case that the locator of any of the defendant's claims placed it crosswise of his discovery vein."

Our discussion of the evidence upon this question and the law relating thereto will be found in our main brief, pp. 107 to 225.

Third. The decision of the Court of Appeals upon the amount due on the accounting so clearly involves issues of fact that no discussion of it is necessary.

The Court of Appeals in its opinion (225 Fed. 742) (Transcript of Record, pp. 492-505):

> "Turning, then, to the finding of the court below relative to the amount of the recovery, the indisputable fact is that many of the issues that conditioned the bases of the accounting were determinable only from conflicting testimony, or from indirect evidence and the rational deductions therefrom, or from scant and unsatisfactory proof, so

that after a study of the record, the truth of the statement of the court below in opening its opinion on the accounting that the record in this matter is voluminous, but in many respects unsatisfactory, and the best that can be hoped for is an approximation of a true account between the parties, is conclusively demonstrated.

"* * * The King Company should not profit in this case by its own wrong, and issues rendered uncertain or doubtful by reason of its failure to discharge its recited duties, or by its confusion of the ores from Conkling ground with those from other sources, must be resolved against it. By that rule, therefore, and by the familiar rule that, where a Court has considered conflicting evidence and made a finding or decree, the presumption is that it is correct, and unless some obvious error of law has intervened, or some serious mistake of fact has been made, the finding or decree must be permitted to stand [Coder vs. Arts, 152 Fed. 943, 946, 8t C. C. A. 91, 94, 15 L. R. A. (N. S.) 372], this Court must be guided in its review of the findings and decree below in this case."

The Court proceeds to state and to discuss in detail the evidence and announces its findings.

THE POSITION OF THE GOVERNMENT

The learned Solicitor General of the United States filed upon this hearing certain suggestions on behalf of the United States. His suggestions relate to two questions; one with reference to the Statute of 1904, and the other with reference to the rule of law announced by the Circuit Court of Appeals, that the courses and distances of the patent are clear and free from ambiguity, and are not subject to be overcome by the introduction of field notes and other testimony respecting monuments on the ground, when such monuments are not referred to in the patent.

It will be remembered by the court that from the beginning, with respect to our agricultural lands, it has been expressly provided by statute that the lines as actually run upon the ground by the surveyor control in case of conflict between said lines and the courses and distances of the Government patent (See Sec. 2396 U. S. Statutes; Fed. Statutes Annoted, Vol. 6, p. 397).

A different policy was provided by the United States with respect to mineral lands until the year 1904. In that year Congress passed a law amending Section 2327 of the statutes, the section as amended being found in the Federal Statutes Annoted, Vol. 10, p. 235. The section as originally existing and as amended, is as follows:

The original Section 2327, as it appeared up to 1904 (a date subsequent to that of the Conkling patent) was as follows:

> "Sec. 2327. The description of vein or lode claims, upon serveyed lands shall designate the location of the claims with reference to the lines of the public surveys, but need not conform therewith; but where a patent shall be issued for claims upon unsurveyed lands, the surveyor-general, in extending the surveys, shall adjust the same to the

boundaries of such patented claim, according to the plat or description thereof, but so as in no case to interfere with or change the location of any such patented claim."

5 Fed. Stat. Ann. 41.

The section as amended, 10 Fed. St. Ann. 235, is as follows, the added portions being italicized:

"Sec. 2327. The description of vein or lode claims upon surveyed lands shall designate the location of the claims with reference to the lines of the public survey, but need not conform therewith; but where patents *have been or* shall be issued for claims upon unsurveyed lands, the surveyors-general, in extending the public survey, shall adjust the same to the boundaries of said patented claims so as in no case to interfere with or change the *true* location of such claims *as they are officially established upon the ground. Where patents have issued for mineral lands, those lands only shall be segregated and shall be deemed to be patented which are bounded by the lines actually marked, defined, and established upon the ground by the monuments of the official survey upon which the patent grant is based, and surveyors-general in executing subsequent patent surveys, whether upon surveyed or unsurveyed lands, shall be governed accordingly. The said monuments shall at all times constitute the highest authority as to what land is patented, and in case of any conflict between the said monuments of such patented claims and the descriptions of said claims in the patents issued therefor the monuments on the ground shall govern, and erroneous or inconsistent descriptions or calls in the patent descriptions shall give way thereto.*"

An examination of this amendment, passed in 1904, shows that, at that time and by that amendment, Congress provided that with respect to patents of mineral land, the

lines as run on the ground by the surveys, should control in case of conflict.

Since 1904, by virtue of the amendment mentioned, the policy of the Government and the law with respect to the effect of patents, is the same both as to agricultural lands and as to mineral lands.

Prior to 1904, however, the policy of the Government was different with respect to the two classes of public lands.

As to mineral lands, there being no statute which made the lands as run upon the ground control in the case of conflict between such lines and the courses and distances of the patents, it was of necessity true that a patent which in plain and unambiguous language conveyed a definite and well defined tract of mineral land, operated to transfer to the patentee, the title to the land described in the patent.

In his suggestions the learned Solicitor General states that this Statute of 1904 "has been considered by the Land Department to have a retroactive aspect, and as being declaratory of existing law" (page 2).

It is submitted that this statement embodies some confusion of thought. If this statute were merely declaratory of existing law it would have no retroactive effect; to have such effect the statute must change existing law. If the statute did not change the law there is no need of making it applicable to prior transactions.

That the Land Department decisions, prior to the passage of the amendment of 1904, were in accord with the law announced and applied by the Circuit Court of Appeals in this case, is, we submit, established by the decisions of that department cited on page 83 of our main brief, and the letter of the commissioner attached as an addendum to our main brief.

But if, as we contend, and as the Circuit Court of Appeals held, the Statute changed the existing law and marked

a radical departure of policy with respect to the granting of mineral lands, then the question whether the Statute is retroactive or otherwise becomes important.

We do not think it necessary to discuss the intention of the Statute. It is clear, on manifest considerations, and upon abundant authority that if the Statute did radically change the existing law with respect to patents of mineral lands it could not legally have a retroactive effect. When once the United States Government has, under existing law, conveyed a part of its mineral land, such land has been carved out of the public domain, and the title to it becomes vested in the grantee; and Congress could not, by a later statute, take away from the grantee any portion of the land legally granted either by repossessing it or by vesting it in a third person.

The patent to the Conkling Claim was issued in February, 1892. It was issued in all respects in accordance with law. By a clear and unambiguous description it conveyed the tract of ground to the grantee therein. The patent was effective to complete the transfer of title. The Congress of the United States could not, in 1904, even if it had intended so to do, enact a law which would divest the grantee of this patent, or his successors in interest, of any of the lands included in the patent.

Our argument upon this point is found on pp. 45 to 58 in our main brief.

The suggestion of the Solicitor General relates further to the ruling of the Circuit Court of Appeals, to the effect that evidence outside of the patent was inadmissable to overcome the clear and unambiguous terms of the patent. He states that this ruling was disturbing to the Land Department. However, after his ex-

amination of the Record, the learned Solicitor General does not regard the controversy as one important to the United States; first, because it might well be held that the rule controlled only in cases presenting special and peculiar features, such as are presented by the Record in this case; and, second, because the case did not turn upon that rule, but the court after announcing that rule proceeded to an examination of the facts, and held that, even if the law were otherwise, the petitioner could not recover because the proof offered was too vague and uncertain to overcome the clear and unambiguous terms of the patent, even if the proof were admissable.

The language of the suggestions of the Solicitor General in this effect is as follows (Suggestions, p. 5):

> "In view of the peculiar circumstances of this case we are not apprehensive of the effect of this ruling since we believe that it might well be held as of limited application, and as controlling only in cases presenting like special and peculiar features, and, further, that its force was broken by the fact that the court, after maaking that ruling, proceeded to a consideration of the field notes and of the evidence offered as to the location of the posts."

SUMMARY

It is submitted that under the circumstances this case is not one where the interests of the United States are seriously involved, and it is further submitted that before this court can reverse the decree of the lower court herein it must search the Record and examine the testimony and find the facts upon each of the issues presented. As the Circuit Court of Appeals found against the petitioner upon the boundary question on

the facts as shown by the Record; and found against the petitioner upon the apex upon the facts as shown by the Record; and determined the amount due upon the accounting upon the facts as shown by the Record, these findings of fact must be examined, and overthrown by this court before the decree of the Circuit Court of Appeals can be reversed.

We submit that the Circuit Court of Appeals was correct in its announcement and application of the law, as well as in its findings of fact; all of which we have fully presented in our main brief.

Respectfully submitted,

WILLIAM D. MCHUGH,
Of Counsel for Respondent.

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October Term, 1919.

SILVER KING COALITION MINES COMPANY, a Corporation,
Petitioner,
vs.
CONKLING MINING COMPANY, a Corporation,
Respondent.
No. 489

AFFIDAVIT OF WILLIAM H. KING.

District of Columbia, ss:

William H. King being first duly sworn deposes and says: I have read the statements made by William C. Prentiss in his affidavit filed in this matter and in respect thereto I make answer as follows:

Prior to assuming my duties in the Senate of the United States I was one of the solicitors for Conkling Mining Company, but when I moved to Washington I gave up any active participation in the litigation and with the consent of my client substituted Mr. William W. Ray, of Salt Lake City, in my place. My name was continued upon the record but I took no part or responsibility in the case thereafter. I have never at any time maintained a law office at Washington.

The brief of William C. Prentiss, *amicus curiae,* was handed to me either by Mr. Prentiss or by some other person on October 4, 1919, of which fact I am certain because on that day I wrote to Mr. E. B. Critchlow stating that the brief had just been handed to me. This letter is as follows:

"October 4, 1919.

"Hon. E. B. Critchlow,
McCornick Bldg.,
Salt Lake City, Utah.

"My dear Friend:

"Yours of the 27th ult. is at hand. Copies of brief for respondent on the petition for certiorari have been received by the clerk. I will be in attendance on Monday and see that the records are presented to the Court.

"I have just received copy of a motion signed by William C. Prentiss, an attorney of Washington, for leave submit, as *amicus curiae*, a brief on the questions of boundaries and on extra-lateral rights on a cross vein. With the motion is a printed brief consisting of forty-six pages. As stated, it has just been handed me and I have had no opportunity to examine it. My present view is to object to its being filed, although the inclination of the Court, I am sure, will be to grant the motion. However, after examining the brief, I shall determine what is the best course to pursue.

"With kind regards and best wishes,

"Yours very truly,

"WILLIAM H. KING."

I had not at the time nor until long after the 20th of October, 1919, the slightest knowledge or any idea that Mr. Prentiss' appearance was otherwise than as appeared upon the face of the brief. Such further examination as I was able to give before Monday convinced me that the brief was antagonistic to the contentions of Conkling Mining Company, but I did not suspect that Mr. Prentiss had been employed by petitioner.

I felt that if it was proper for me to call the attention of the Court to the fact that the case had been pending for many years, and that the cause had once before been before the Supreme Court on a petition for writ of certiorari which was denied, I ought to do

so. I went so far as to ask advice at the office of the Clerk and was informed that such a proceeding was unknown.

On Monday before the Court convened I was served with a copy of the suggestion of the Solicitor General, and thereupon abandoned the idea of making any objection to the filing of the Prentiss brief because I thought the suggestion by the Government would probably induce the granting of the writ. Specifically replying to the statement of Mr. Prentiss on page 11 of the printed affidavits and argument of petitioner herein, I wish to state positively that it does not convey a correct impression as to what occurred. It is true that in the Court Room I did in a jocular manner ask him why he was "butting into the case," and whom he represented? I may possibly have said jokingly that I believed he represented the petitioner, though I have no recollection of using this language. I may jokingly have threatened to object to his appearance, though I do not recall having done so.

The only thought at any time in my mind had been to object, if proper, to the intrusion of an *amicus curiae* in view of the past history of the case. I am certain that I did not tell Prentiss either in substance or effect that the reason why I had not made objection was because to have done so would have aroused the Court's curiosity as to what was in his brief or that this Court would have been more anxious then to receive and consider the brief. What I did say to Prentiss when he spoke to me about my not making objection was that I felt it useless in view of the suggestions filed by the Solicitor General.

Further in respect to the statement of Prentiss that he docketed the appeal in this same cause, I have to say that I never examined the record in the appeal at any time. Sometime since January first, 1920, upon request of Mr. Critchlow I endeavored to obtain information at the Clerk's Office as to this case. Through a confusion of titles the representative of the clerk in-

formed me that the appeal was docketed by Prentiss in October, 1916, but it made no impression on my mind as I understand this and similar courtesies are frequently performed by lawyers residing in Washington for non-resident lawyers. I wish further to say that it was not until I was informed by Mr. E. B. Critchlow, of Salt Lake City, of the rumors that Prentiss had imposed upon Court and Counsel, that I suspected what the real facts might be, nor did I have any reason for anything more than suspicion until I received the transcript of Mr. Ferry's testimony given April 27, 1920.

Further deponent sayeth not.

WILLIAM H. KING.

Subscribed and sworn to before me this 3d day of June, 1920.

JOHN J. MCGRAIN,
Notary Public.

AFFIDAVIT OF E. B. CRITCHLOW.

District of Columbia, ss:

E. B. Critchlow being first duly sworn deposes and says: I have read the affidavits of W. Mont Ferry and William C. Prentiss herein and in respect thereto state as follows:

I am convinced that Mr. Ferry and Mr. Prentiss are mistaken as to the time and the circumstances under which it was agreed or arranged for Mr. Prentiss to act as *amicus curiae* in this case for this reason:

When I served upon Mr. Thomas Marioneaux, one of the petitioner's solicitors, at Salt Lake City, on May 17, 1920, the notice and motion herein, he voluntarily and not in any confidence told me that Mr. Ellis had

conferred with him as to whether it would be better for Mr. Prentiss to appear in the litigation as a solicitor for petitioner and file a brief, or appear as an *amicus curiae;* that he, Marioneaux, stated to Mr. Ellis that by all means it would be better for Prentiss to appear as *amicus curiae;* that he, Marioneaux, had not at the time any thought of asking Prentiss to do this for pay, and that afterward when he found that Prentiss had been employed and paid and was at the same time appearing as a friend of the Court he was amazed and wondered how he, Prentiss, could commit such an impropriety; that he always did wonder that Prentiss would do such a thing, but that if Mr. Prentiss could see his way to do so, it was not for him, Marioneaux, to object.

I am unable to state that Mr. Marioneaux said in so many words that this conversation with Ellis took place before Ellis and Ferry went to Washington, but Mr. Marioneaux distinctly conveyed to me the idea that it did. At no time has Mr. Marioneaux ever suggested to me or to any one else to my knowledge that he did not know that Prentiss had been paid a fee in the case before he received the brief of Prentiss as *amicus curiae.* It has never been asserted by any of the solicitors for the Silver King Coalition Mines Company that they were not aware long before October 6, 1919, that the brief was to be filed by Prentiss as *amicus curiae;* that this is the fact I am convinced by the many rumors which have come to my ears that the petitioner and its officers were boasting that something had been "put over" on the respondent.

It is true as stated by Mr. Ferry that I was at one time a stockholder of Silver King Coalition Mines Company, but have not individually been such for several years. I believe that in 1919 there were one or two small certificates in the name of my firm, Pierce, Critchlow and Barrette, and that up to March, 1920, I was the equitable owner of 100 shares of this stock,

worth about $185.00. It is true that a statute of Utah such as is spoken of by Mr. Ferry on page 6 of his brief exists, and if I had suspected wrong-doing prior to October, 1919, or after my suspicion was aroused had thought an examination of the vouchers of the respondent company would disclose any information of value, I might have attempted to use my private rights for the benefit of my client, provided I were willing to commit such impropriety.

Further in respect to the statement on page 7 of the affidavit of Mr. Ferry, I have to say that I expected that the petition for the writ of certiorari would in due course be acted on by this Court on October 13th. I was obliged to go and did go to Los Angeles on the 8th or 9th of October, 1919, and was there on business until about the 20th. I had no reason to think I had any right to ask to be heard. The entire responsibility of the case was upon me, and I was 2,000 miles or more away. Had a proper brief been served so that I could have answered it, I would not have complained.

In answer to the affidavit of William C. Prentiss, I have to say that Mr. Prentiss is entirely in error as to any personal investigation made by me of records in the Interior Department. Prior to May, 1920, I had not been in Washington for more than four years. The fact is my son and partner, Mr. F. B. Critchlow came to Washington in January, 1920.

I instructed him while here to examine the records of the Interior Department to see what they disclosed material to the Conkling case. It is obvious that the omitted letter, to which the letter of August 8, 1904 (Prentiss brief, Appendix B), is an answer, was an important document. He obtained a photo-stat of this letter and brought it to me. Whether or not it was overlooked by Mr. Prentiss or its importance was or is underestimated by him, I have no means of knowing.

I was informed by Mr. F. B. Critchlow that he took no pains to count or compute the number of patents given by Prentiss as 20,000, deeming the matter of no materiality.

I desire to state that until April 27, 1920, I had nothing but unconfirmed suspicions and hesitated to, and, my associates Hon. W. W. Ray and Hon. W. D. McHugh concurring, refused to make the serious charges which are made in our motion until obtaining apparently convincing proof of the facts.

I have also read the brief prepared by Mr. Marioneaux at the City of Washington, filed by him on June 1st, and particularly pages 14 and 15 thereof.

Whether material or not to the instant matter I deem it important to state the precise facts:

It is true that I was unwilling to sign the "usual stipulation" which is to the effect that the record taken up to the U. S. Supreme Court by the petitioner shall be used as the record in that court after the writ is granted. This is the only instance in my practice in which so far as I can remember there has been occasion for such refusal. The reason in this case was that only a partial record was taken up by the petitioner upon the application. An inspection of the files of this Court will show that there are numerous exhibits of every kind which have never been sent to this Court. I explained my refusal to Mr. E. E. Koch, the Clerk of the Circuit Court of Appeals, who approved my position. The statement that much time was spent in an effort to agree with counsel upon parts of the record essential to be sent up for a proper review of the case is not true in any sense. My view was that upon a review on writ of certiorari the entire case would be reviewed and every feature of it and that the whole record including all exhibits must be certified by the Clerk of the Circuit Court of Appeals. Upon becoming convinced of the correctness of my position, Mr. R. G. Lucas (Mr. Marioneaux being absent in Ari-

zona, Mr. Ellis in California), applied to me in February or March, 1920, for a stipulation stating what constituted the entire record. This I refused to sign, offering that if the petitioner would get together or indicate that the Clerk of the Circuit Court of Appeals had the exhibits I would agree as to their identity, further stating that I felt sure the exhibits were greatly scattered. This Mr. Lucas agreed to do and that his associate, Mr. Adamson, would proceed as rapidly as possible.

Not many weeks thereafter I was served with what were said to be copies of certain very important maps, exhibits in the cause, with the demand that I agree that these might be substituted for the originals. This I refused upon the ground that I knew they were not and are not full copies, and I demanded that the originals be secured. These originals were used by the Silver King Coalition Mines Company in another case called the Keystone case. There were other objections which I made a matter of record in the District Court. It was upon the hearing in the District Court in an attempt to trace these and other exhibits that the testimony of W. Mont Ferry was given. At the same time corroborative testimony as to the employment of William C. Prentiss was given by Frank J. Westcott, secretary of the petitioner, and payments made by him on behalf of the company, but no suggestion was made by him or counsel for the petitioner that the fee paid was otherwise than for services in the preparation and filing of the brief on the petition for the writ.

Further deponent sayeth not.

E. B. Critchlow.

Subscribed and sworn to before me this 3d day of June, 1920.

John J. McGrain,
Notary Public.